NO. 86-1213

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Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1987

ARNALDO JIMENEZ-FUENTES, ET AL.,
Petitioners,

v.

HON. JAIME TORRES GAZTAMBIDE,
SECRETARY OF HOUSING OF THE
COMMONWEALTH OF PUERTO RICO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION

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Secretary of Justice
Commonwealth of Puerto Rico

HON. RAFAEL ORTIZ CARRION
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March 2, 1987

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

26 pp

QUESTION PRESENTED

Whether, under the *Elrod-Branti* doctrine, Petitioners were properly dismissed from the positions of regional directors of the Urban Renewal and Housing Corporation of Puerto Rico, because party affiliation was an appropriate requirement for the effective performance of those public offices, since:

(a) the powers inherent to those positions authorized, directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation;

(b) the positions stood in a relationship of confidentiality in respect to public policy; and

(c) the officeholder served as the administration's spokesperson, pipeline and advocate at the regional level.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court of Appeals for the First Circuit were Arnaldo Jiménez-Fuentes, his wife Olga Osorio and their conjugal partnership, José Vicente Vázquez, his wife Celestina Almodovar, and their conjugal partnership, Petitioners herein; and Hon. Jaime Torres-Gaztambide, as Secretary of Housing of the Commonwealth of Puerto Rico, his wife Carmen Gladys Vincenty, and their conjugal partnership, Rolando Quevedo del Río, Executive Director of the Urban Development and Housing Corporation of Puerto Rico, his wife Ginny Motta, and their conjugal partnership, Respondents herein. All Respondents were sued in both their official and personal capacities.

Respondent Jaime Torres-Gaztambide resigned as Secretary of Housing in January, 1986, and was replaced by Hon. Ariel Nazario. Respondent Rolando Quevedo del Río resigned as Executive Director of C.R.U.V. in December, 1985, and was replaced by Ms. Nereida Falto de Cole.

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On Petition for a Writ of Certiorari
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for the First Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari filed by Petitioners, seeking review of the First Circuit's judgment in this case. The opinion *en banc* upon which that judgment is based is reported as *Jiménez Fuentes v. Gaztambide*, 803 F.2d 1 (1st Cir. 1986) (*Jiménez Fuentes*). *See also* Ptn. App. A31-A60.

STATEMENT OF THE CASE

The question presented in this case arose from a civil rights action filed by Petitioners that challenged the authority of the newly elected government of the Commonwealth of Puerto Rico to appoint, to a limited number of policymaking positions, those public officials that formulate and implement the policies that have been sanctioned by the electorate. The relevant facts of this case are adequately set forth in the opinion of the court of appeals, *see* 803 F.2d at 2, and require little elaboration. Respondents in this case are the Secretary of Housing of the Commonwealth of Puerto Rico and the Executive Director of the Urban Development and Housing Corporation ("C.R.U.V.").[1] They were appointed to those offices during the first two months of 1985 by the administration that assumed power in January, 1985, after the Partido Popular Democrático (PPD—Popular Democratic Party) defeated the Partido Nuevo Progresista (PNP—New Progressive Party) in the November, 1984 gubernatorial election.[2]

Petitioners were two of the eleven Regional Directors of C.R.U.V. in all of Puerto Rico. They served under the Executive Director and the Associaté Director of C.R.U.V. As Regional Directors, Petitioners headed two of the regions of the Program for Public Housing, the principal division of C.R.U.V. Under the Regional Directors serve 3000 of the 3600 employees of C.R.U.V. Thus, Petitioners supervised approximately 300 employees in each of the regions they headed.

The inherent powers and functions of a Regional Director are contained in a job description as to which there was no disagreement at any of the hearings held in this case. The job description

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[1] "C.R.U.V." is the acronym for the Spanish name of the Urban Development and Housing Corporation ("Corporación de Renovación Urbana y Vivienda"), a public corporation of the Commonwealth of Puerto Rico, P.R. Laws Ann. tit. 17, §§ 21-25 (1984), which is attached to the Department of Housing of the Commonwealth, P.R. Laws Ann. tit. 3, § 441e (1982).

[2] The PNP was the ruling party in Puerto Rico from 1977 to 1985.

contains twenty distinct duties, and was included as an Appendix to the First Circuit's opinion. *See* 803 F.2d at 12. The inherent powers contained in that job description showed that the Regional Director proposes, establishes, and implements public policy. For instance, he "[d]irects, plans, and supervises operational activities of the Region, [p]repares and controls the Region's budget, [and] [r]ecommends improvements in the program to [the] Executive Director." *See* 803 F.2d at 12, items 1, 19 and 15. Similarly, the position has well-defined representative and spokesperson functions, such as attending "meetings, as agency representative, with other government officers and civic leaders to coordinate government services offered to public-housing residents," and meet "with residents and the general public to resolve problem cases." *Id.* items 6 and 12. Moreover, the agreed to functions demonstrate that the Regional Director is privy to confidential information, since he "[r]ecommends recruitment, dismissals, promotions, salary increases, and other matters for Region's employees." *Id.* item 10.

The position of Regional Director is closely related to partisan political interests or concerns. The Regional Directors are the top line officers or proconsuls for C.R.U.V. within their region, representing the agency in all respects. Moreover, each region is a microcosm of the larger agency, and the duties of each Regional Director are representative of the duties of the agency's Executive Director. The political concerns or interests of C.R.U.V. can hardly be disputed. C.R.U.V.'s objective is to improve the living conditions of low and middle income families in urban areas. *See* P.R. Laws Ann. tit. 17 § 22 (1977), §§ 32, 38, 40, 41 (1938), *and* § 86 (1964). Its customers include almost 300,000 families. The provision of housing to low and middle income city residents is a vital political issue of crucial importance to partisan program goals. It is no exaggeration to say that elections often turn on the success or failure of the incumbent to provide public services such as housing. That party affiliation is an appropriate requirement for the effective performance of a job of this nature can hardly be questioned.

In March 1985, Respondents transferred Petitioners from the positions of Regional Director to the positions Petitioners had held previously in C.R.U.V. as career civil servants.[3] Petitioners sued Respondents claiming that they had been transferred for political reasons in violation of the First and Fourteenth Amendments to the Constitution of the United States. After a lengthy hearing, the United States District Court for the District of Puerto Rico issued a preliminary injunction, ordering Petitioners' reinstatement.

A panel of the court of appeals denied Respondents' petition for stay, granted an expedited appeal, and affirmed the order of the district court. After the panel denied a rehearing, the court of appeals vacated the panel's opinion, and set the case for rehearing *en banc*. On September 19, 1986, after full briefing and oral argument, the court of appeals, *en banc*, reversed the issuance of

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[3]Under the Puerto Rico Public Service Personnel Act of 1975, P.R. Laws Ann. tit. 3, §§ 1301-1431, that establishes a modern civil service system in Puerto Rico, all government employees are classified in one of two categories: career employees and confidential (trust) employees. *Id.* § 1349. Under the statute, the position of Regional Director is classified as a confidential position or a position of trust. *Id.* § 1350. Employees in these positions have no property right, but are "of free selection and removal." *Id.* Confidential positions constitute a restricted category that cannot surpass 25 such positions per agency, except in extraordinary circumstances due to the size or complexity of the agency. *Id.* § 1351. All other positions are classified as career positions. *Id.* § 1352. Confidential positions are restricted to those positions that "intervene or collaborate substantially in the formulation of public policy, who advise directly or render direct services to the head of the agency." *Id.* § 1350. The objective of this restricted category is to "assure that the government has adequate means, through the wise and restricted use of the confidential service, to implement the public policy validated by the majority. . . ." *Id.* § 1312(5).

The civil service system of Puerto Rico is a carefully wrought system for the administration of government personnel. It is the end result of the hard fought efforts of many years aimed at establishing merit as the principle that shall govern the entire system. *Id.* § 1311. The people of Puerto Rico justly feel proud of this accomplishment.

of the preliminary injunction.[4] Petitioners then sought review from this Court, seeking to overturn the *en banc* decision of the First Circuit.

REASONS FOR DENYING THE WRIT

I. *The First Circuit's Decision Is Not In Conflict With the Decisions of This Court or of Any Federal Circuit Court of Appeals.*

Petitioners' principal argument—that the court of appeals' decision is in conflict with this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976) (*Elrod*) and *Branti v. Finkel*, 445 U.S. 507 (1980) (*Branti*)—is simply wrong. Indeed, apart from pointing out an alleged conflict between the First Circuit's opinion *en banc* in *Jiménez Fuentes*, and its companion case *De Choudens v. Government Dev.Bank*, 801 F.2d 5 (1st Cir. 1986) (*De Choudens*),[5] Petitioners fail to indicate the nature or extent of the

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[4]Throughout this litigation Respondents have asserted that Petitioners were transferred from their positions of regional directors because of their failure to comply with the standards set by the Department of Housing and Urban Affairs for the administration of federally funded public housing projects. Such failure jeopardized further federal funding and embarrassed C.R.U.V. Petitioners' demonstrated incompetency was a legitimate reason for their transfers, even in the absence of the alleged protected conduct. *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-87 (1977); *Givhan v. Western Line Consolidated School*, 439 U.S. 410, 416-17 (1979); *Rosaly v. Ignacio*, 593 F.2d 145, 148-49 (1st Cir. 1979). The First Circuit expressed doubts whether it would have reached the same conclusion as the district court on this issue, *Jiménez Fuentes*, 803 F.2d at 3, but held that in light of its decision on the *Elrod-Branti* issue, it "need not decide whether the district court erred in finding that the [Petitioners] would not have been fired but for their party affiliation." *Id.* at 11.

[5]*De Choudens* is pending decision by this Court on a petition for certiorari. *See* No. 86-1022.

alleged conflict.[6] Petitioners merely claim, without any basis in fact whatsoever, that *Jiménez Fuentes* will force people "to bury [their] political beliefs, keep silent and join the Popular Democratic Party." (Ptn. 12.) Contrary to Petitioners' unfounded allegations, a reading of the opinion *en banc* in *Jiménez Fuentes* clearly demonstrates that it is consistent with *Elrod* and *Branti*, as well as with the considerable body of case law from circuit courts of appeals and district courts that have applied the teachings of those two decisions. There is no conflict and no justification for this Court's intervention.

For purposes of appellate review, the court of appeals faced the limited issue whether in light of the applicable standard, the district court abused its discretion when it issued a preliminary injunction reinstating Petitioners to their positions as Regional Directors.[7] *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 823 (1st Cir. 1979) (*quoting Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)). In order to effect its review, the court of appeals had to decide if the district court had applied an improper standard to determine the dispositive issue—whether political affiliation was an appropriate requirement for the position of C.R.U.V. Regional Director. The First Circuit was up to that task and correctly discharged its duty.

The court of appeals recognized that the decisions in *Elrod* and *Branti* allow a limited exemption from First Amendment protection against discharge for reasons of political affiliation. That limited exemption is necessary in order to protect the important democratic value, that in our system of representative government, the direction of governance is determined by the popular election of top office holders. Hence, a political firing is constitutional only when it serves the vital governmental interest "that

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[6]*See also* the discussion in note 9, below.

[7]The constitutionality of the demotions was not before the court of appeals, nor before the district court, because there has been no trial on the merits. *See Thornburgh v. American College of Obstetricians and Gynecologists*, — U.S. —, —, 106 S. Ct. 2169, 2207 (1986) (O'Connor, J. dissenting).

representative government not be undercut by tactics obstructing the implementation of policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367 (plurality). To prevent such undercutting, representative democracy needs a certain amount of leeway for partisan selection of agents in order to work.

The First Circuit correctly concluded that according to *Elrod-Branti*, such vital state interests are sufficiently protected by limiting patronage dismissals to those policymakers or confidential employees whose positions relate to "partisan political interests [or] concerns," *Branti*, 445 U.S. at 519, where the hiring authority satisfies *Branti*'s "ultimate inquiry," *i.e.*, that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. In short, we submit that the court of appeals correctly interpreted the limited exception established by this Court in *Elrod* and *Branti*, and that its decision, in light of the public offices involved in this case, does not deviate from those precedents in any significant manner.

The court of appeals recognized that it is not always easy to determine when a particular position comes under the exemption, and that further elaboration was needed in order to reach a proper solution in this case. *Jiménez Fuentes*, 803 F.2d at 5. To this end the court sought guidance in the coherent and consistent corpus of case law developed by other circuit and district courts, and construed a set of criteria for the application of *Branti*'s standard. These criteria require the hiring authority to satisfy two strict inquiries in order to meet *Branti*'s standard that "party affiliation [be] an appropriate requirement for the effective performance" of the office. 445 U.S. at 518. First, a "threshold inquiry" must be answered, which the court of appeals derived from *Branti*, and involves examining "whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests [or] concerns'." *Jiménez Fuentes*, 803 F.2d at 6. This means, the court states, determining whether "the position involves government decisionmaking on issues where there is room for political disagreement on goals or their implementation." *Id.* If this inquiry is satisfied, the hiring authority must

then establish that the "particular responsibilities of the position" resemble "a policymaker, a privy to confidential information, a communicator. . . ." *Id.* In conducting such inquiry the court will "focus on the powers inherent in a given office," not the functions actually performed by a particular occupant. *Id.*

To allege, as Petitioners plead, that such criteria conflict with *Elrod-Branti* is clearly wrong. And it is patently absurd to claim, as Petitioners do, that by so holding, the First Circuit has given an "imprimatur" to the "loopholes" that "government officials at all levels have searched for" to deny public employees First Amendment protection, with the attendant dire results. (Ptn 11.) Indeed, the criteria formulated by the First Circuit limit the leeway that the elected public officials have, and strike a balance between the state interest in advancing representative democracy and the First Amendment protection to be afforded to government employees. In sum, the expressed criteria are rather circumspect, and clearly consistent with this Court's rulings.[8]

The position adopted by the First Circuit in this case reiterates and accepts the doctrinal elements developed in previous cases by other circuit and district courts. The court paid particular heed to several decisions from the Seventh Circuit which were probably the first to state a general formulation for the application of the *Elrod-Branti* standards. Also these are decisions in which certiorari was denied by this Court. *See Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982);

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[8]It is evident that the criteria adopted by the court of appeals are protective of the employees First Amendment rights. The hiring authority is required first to demonstrate that the subject matter of the agency in question is political in nature, *Jiménez Fuentes*, 803 F.2d at 7, in the sense that the services it provides be a "vital political issue." *Id.* However, satisfying the first inquiry would be insufficient. In order to succeed, the hiring authority must also prove that the position is policymaking, confidential or communicator. In addition, the First Circuit includes positions that are privy to confidential information within the threshold inquiry, contrary to the more flexible positions followed in other circuits. *See Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986), *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985).

Tomczak v. City of Chicago, 765 F.2d 633 (7th Cir.), *cert. denied*,— U.S.— , 106 S. Ct. 313 (1985). Moreover, the position of the First Circuit is consistent with the decisions of many other federal courts. *See, e.g., Committee to Protect the First Amendment Rights of Employees of the Dep't of Agric. v. Bergland*, 626 F.2d 875 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981); *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285 (7th Cir.), *cert. denied* 471 U.S. 1117 (1985); *Awtry v. United States*, 684 F.2d 896 (Ct. Cl. 1982); *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D.N.Y. 1982); *Joyner v. Lancaster*, 553 F. Supp. 809 (M.D.N.C. 1982); *Gametto v. Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981); *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

The application made by the court of appeals of the *Elrod-Branti* doctrine to the facts of this case, also demonstrates its correct understanding of the doctrine, as well as the lack of conflict with this Court's decision. *Jiménez Fuentes*, 803 F.2d at 7-11. The court's analysis of the inherent powers and functions of the position of Regional Director held by Petitioners, and the conclusions reached by the court, speak for themselves, and need no elaboration at this point.[9] Evidently "a practical sense for the

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[9]Contrary to Petitioners' assertion, the First Circuit decision that appears to be contrary to *Elrod-Branti*, and to the coherent and consistent lower court decisions, is not *Jiménez Fuentes*, but its companion case, *De Choudens*. In that case, the court of appeals found that a position of Vice-president of Finance for the Commonwealth Government Development Bank, that everyone agreed was a policymaker and a privy to confidential information for a Bank that involves partisan political concerns, and whose responsibilities included that it provide "valued policy contributions, recommendations, and advice," to be insufficient to satisfy the exception, because "they involve politically-neutral, technical, and professional matters." *De Choudens*, 801 F.2d at 9. The court concluded that such position was not within the group of the "Bank's strategic leadership positions which are ones for which political affiliation is an appropriate requirement." *Id.* at 8.

Such conclusions are questionable. We have not found any decision that would deny the *Elrod-Branti* exemption to a position so highly placed in the government

political-governmental system in operation," guided the First Circuit, and allowed it to recognize the crucial role a regional director plays in the structure of the government of the Commonwealth of Puerto Rico.

In Puerto Rico, contrary to the situation existing in the states, all of the primary functions of the government have been entrusted to the Commonwealth government by the Constitution of Puerto Rico. *See* P.R. Const. art. IV; P.R. Laws Ann. tit. 3 §§ 1-451. That is to say, the Commonwealth government provides all important services to the people, such as police and fire protection, public schools and universities, hospitals, transportation, including carriage of goods by sea, libraries, all public utilities, such as electricity, telephone, water and sewage services, not to say housing, welfare and other social services, industrial and agricultural development and production, and so on. About the only thing the Commonwealth government does not do is pick up the garbage, which is a function traditionally entrusted to the municipal governments. In short, in Puerto Rico the government at the state level has been entrusted with those functions that in the United States are usually in the hands of local government units, such as counties or municipalities. *See, e.g., Tomczak v. City of Chicago*, 765 F.2d at 641.

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hierarchy, but have found many decisions that exempt positions with much lesser responsibilities. *See, e.g., Nekolny v. Painter*, 653 F.2d at 1169-70 (senior citizen coordinator of township). *De Choudens* also departs from the well accepted doctrine, recognized in Jiménez Fuentes, 803 F.2d at 6, that the appropriateness of political affiliation is to be decided on the basis of the powers inherent to the office, not on the functions performed by a particular occupant of the office. *Cf. De Choudens*, 801 F.2d at 9-10. In sum, *De Choudens* appears to carve out an exception to the *Elrod-Branti* exemption, meant to be applicable to true government policymakers, simply because they deal with so-called technical and professional matters, in spite of the crucial importance of such matters for the direction, pace, or quality of governance.

Nevertheless, the errors the First Circuit might have committed in *De Choudens*, and the difficulty of reconciling it with *Jimenez-Fuentes*, does not justify this Court's intervention with the correct decision in this case.

Indeed, as the cases previously cited serve to illustrate, in the United States, the issue in this type of case arises in the context of much simpler government structures, usually below the state level. *See*, *e.g.*, *Nekolny v. Painter*, 653 F.2d at 1169-70 (senior citizens' coordinator of township may qualify as policymaker); *Ness v. Marshall*, 660 F.2d at 520-23 (city solicitor and assistant city solicitor were policymakers); *Soderbeck v. Burnett County*, 752 F.2d at 288 (the sheriff's confidential secretary); and *Ecker v. Cohalan*, 542 F. Supp. at 900-03 (chief deputy commissioner of parks was both a policymaking and confidential employee). Also, one should not forget that in the United States many of the regional, municipal and other local government units are headed by elected officials. In Puerto Rico a radically different situation exists, as the only elected official of the executive branch is the Governor, and there are no elected officials at the regional level. Therefore, any newly elected governor must rely exclusively on appointed officials in order to put his party's program into effect.

Most agencies of the Commonwealth government, such as C.R.U.V. in this case, are decentralized and perform many functions at a regional level. The agency's regional directors are responsible for planning, coordinating, and managing the agency's programs at the regional level. They supervise a regional staff that may range to hundreds of employees, as happens in this case. Such positions are the natural source for influential recommendations of changes in policy, and act widely as public speakers and educators regarding the state programs, thereby serving as pipelines and advocates at the municipal and regional level. In short, the position of regional director is an indispensable component in the structure of the government of the Commonwealth.

The similarities, in terms of functions and importance, between the position of regional director involved in this case and the state directors found to be subject to the *Elrod-Branti* exception in prior cases are self-evident. *See Awtry v. United States*, 684 F.2d at 897; *Committee to Protect First Amendment Rights of the Employees of the Dep't of Agric. v. Bergland*, 626 F.2d at 879.

In sum, the position adopted by the First Circuit in this case is correct. A Regional Director of C.R.U.V. is a "vital cog in the machinery of a new Administration's" formulation and implementation of its policies, it is the "critical position [for] insuring either the success or failure" of such policies, and it is certainly to be expected that the position be filled by individuals who will openly support and aggressively implement the policies of the party in power. *Brunton v. United States*, 518 F. Supp. at 239. *Branti*'s ultimate inquiry was satisfied in this case. Review by this Court is unnecessary.

II. *The Decision of the First Circuit Is Not In Conflict With Any Federal Question Decided by the Supreme Court of Puerto Rico.*

Although the Petition is far from clear on this matter, Petitioners seem to argue that the decision of the First Circuit in this case conflicts with decisions of the Supreme Court of Puerto Rico on the same federal question—the application of *Elrod* and *Branti* to government employees. (Ptn. 13-20) Petitioners' position is incorrect. There is no such conflict. The decisions of the Supreme Court of Puerto Rico cited by Petitioners are based on that court's interpretation of the Constitution of Puerto Rico. *See Báez Cancel v. Mayor Municipality of Guaynabo*, 100 P.R.R. 982 (1972); *Ramos Villanueva v. Secretary of Commerce*, 112 P.R.Dec. 514 (1982); *Díaz de Llobet v. Office of the Governor*, 112 P.R.Dec. 747 (1982); *Olivieri v. Pierluisi*, 114 P.R.Dec. 23 (1983); *Colón v. C.R.U.V.*, 115 P.R.Dec. 503 (1982). *See also Clemente González v. Departamento de la Vivienda*, 114 P.R.Dec. 763 (1983), which is not cited by Petitioners.

Petitioners rely on out of context quotations from these opinions to claim that the Supreme Court of Puerto Rico based its decisions on the First Amendment to the United States Constitution, and that those decisions are in direct conflict with the First Circuit's decision. This argument seems to ignore the fact, as

demonstrated by several of the quotations included in the Petition, that what the Supreme Court of Puerto Rico is doing is interpreting the Constitution of the Commonwealth. *See* quotations to *Báez Cancel* (Ptn. 15), *Ramos Villanueva* (Ptn. 16), *Olivieri* (Ptn. 17).

The First Circuit has considered several of the opinions cited by Petitioners, and has correctly concluded that they do not represent the state of the federal law on this matter. Rather, "they go further than do most circuit and district court interpretations of *Elrod-Branti* in refusing to allow political firings at the higher levels of government." *Hipólito Rodríguez Rodríguez v. Nicholas Muñoz Muñoz*, No. 85-1215, slip op. at 10 (1st Cir. Dec. 18, 1986); *Jiménez Fuentes*, 803 F.2d at 7 n.9. The reason for the greater amplitude of the Puerto Rican decisions is clear. Puerto Rico's highest court is interpreting the Constitution of Puerto Rico, and that court has always considered the Commonwealth's Constitution to provide a broader protection of civil rights than that afforded by the Constitution of the United States. *See Estado Libre Asociado v. Hermandad de Empleados*, 104 P.R.Dec. 436, 440 (1975).

In sum, at most what the decisions of the Supreme Court of Puerto Rico reveal is that the First Circuit and Puerto Rico's highest tribunal may have reached differing results on the basis of their independent interpretation of different legal texts. Such divergence is too slender a reed on which to base a petition for certiorari. The petition should be denied.

III. *The Court of Appeals Did Not Engage In Independent Review of the Trial Court's Findings of Fact.*

Petitioners argue that the court of appeals engaged in an independent review of the trial court's findings of fact in violation of the rule laid down by this Court in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) (*Anderson*). They also contend that the court of appeals' conclusions regarding, "whether political affiliation is an appropriate requirement for" petitioner's posi-

tion, was based on allegedly "non-existent" evidence. (Ptn. 21.) Apparently, the non-existence of the evidence is based on the fact that the *district court* refused to incorporate Petitioners' objections to the statement of proceedings prepared by the parties and approved by the district court pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure.

All these arguments are plainly frivolous. First, the court of appeals did not in the least disturb the district court's findings of fact. On the contrary, the First Circuit reviewed only the standard of law used by the trial court and its application to the facts of the case, on the question of whether political affiliation is an appropriate requirement for the effective performance of the duties inherent to Petitioners' positions as regional directors. The underlying facts, necessary to make that determination, were not in dispute. The duties of Petitioners' positions were contained in a job description, admitted to evidence by *stipulation of the parties*. 803 F.2d at 8. The other "indicia" relevant to that determination, such as number of employees supervised by Petitioners, the influence of the position, the regional structure of the statewide agency, pay, and the representative and spokesperson nature of the position, were also not in dispute. In such a case, that is, when the nature of the position and its functions and duties are clear or undisputed, as happened in this case, the question whether political affiliation is an appropriate requirement for the effective performance of the job is exclusively a question of law. *Jones v. Dodson*, 727 F.2d 1329, 1336-37 (4th Cir. 1984); *Ness v. Marshall*, 660 F.2d at 522. *Accord Soderbeck v. Burnett County*, 752 F.2d at 288-89 (question for jury *if* facts are in dispute).

At most, in a case where the underlying facts are not in dispute, the question of whether political affiliation is an appropriate requirement for the effective performance of a job is a mixed question of law and fact. In such a case, as pointed out in *Miller v. Fenton*, — U.S. —,— , 106 S.Ct. 445, 452 (1985), where "the relevant legal principle can be given meaning only through its application to the particular circumstances of the case, the Court has been reluctant to give the trier of fact's conclusions

presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984).

Even as to this ultimate question, however, the differences between the court of appeals and the trial court were related to their different understanding of the *Elrod-Branti* doctrine. It is not even clear that the district court decided that political affiliation was not an appropriate requirement for Petitioners' positions. Indeed, in its opinion the court of appeals stated that the district court "did not explicitly reach a contrary conclusion," but "rather, it seems to have based its decision primarily on the fact that it had not been convinced that termination based on political affiliation is justified when the administration could invoke the 'simple expediency of disciplining or removing an employee who refuses to obey an executive order which reflects the program of the Administration regardless of the employee's political affiliation'." 803 F.2d at 11.

The court of appeals concluded that the trial court had erroneously interpreted *Branti*, because when a partisan termination is defended on the ground of the need for political loyalty so that the administration can carry out the policies sanctioned by the electorate "there is no requirement that the employer wait for cause to dismiss an employee of a different party." *Id.* at 12. "The district court seemingly ignored this implication, accepting the expert's testimony that political affiliation may be appropriate but deciding that the interest could be served by dismissing employees when the employee acts in a manner obstructive of the administration." *Id.*

The *Anderson* case is wholly inapplicable to this case. In Anderson, the Fourth Circuit failed to apply the clearly erroneous standard mandated by Rule 52(a) of the Federal Rules of Civil Procedure, to the trial court's finding of fact that a female applicant for position of City Recreation Director was discriminated against on account of her sex. The finding reviewed by the court of appeals in that case was a finding of intentional discrimination,

which is clearly a finding of *fact* and does not involve a question of law. Contrariwise, in the present case the court of appeals *confirmed* the trial court's finding that Petitioners' demotions were motivated by political discrimination, using the clearly erroneous standard of Rule 52(a). The court of appeals only reviewed a question of law.

Second, Petitioners' contention that the court of appeals relied on "non-existent" evidence and preferred the testimony of Respondents' expert witness to the trial court's conclusions of fact, is without merit. The court of appeals refers to the testimony of Respondents' expert witness to provide an example of political differences in the Puerto Rican partisan context which clearly affect the "direction, pace, or quality of governance." 803 F.2d at 6. The court refers to the fact that one party favors government administration of properties while the other prefers private management, and one party prefers the utilization of federal funds while the other supports the use of local funds. *Id.* at 8. These facts were also not in dispute. Indeed, this part of the testimony was taken by the court of appeals from the *opinion* of the district court. That court had acknowledged these facts, as testified by the expert, but had reached a different conclusion regarding the application of the *Elrod-Branti* exception, because it used an incorrect standard of law. (Ptn. App. A4.) Therefore, there is no disagreement at all between the court of appeals and the trial court on the facts of the case. The court of appeals conclusion of law is not based on "non-existent" evidence. It rests on facts that were expressly acknowledged by the district court in its opinion.

Finally, Petitioners complain that "[t]he District Court did not heed," Ptn. 23, their objections to the Statement of Proceedings that was prepared and adopted by the district court in accordance with Rule 10(c) of Federal Rules of Appellate Procedure. Apparently, Petitioners want this Court to review the decision of the district court approving and adopting such statement. That request is so unreasonable as to merit no further comment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1987